STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD HARDY,

Defendant-Appellant.

UNPUBLISHED
February 16, 1999

No. 197500
Midland Circuit Court
LC No. 95-007637 FH

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree retail fraud, MCL 750.356c; MSA 28.588(3). He was sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to a term of four to twelve years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction arises out of an incident in which defendant and an accomplice entered the Elder Beerman store in the Midland Mall with empty bags. Defendant's accomplice subsequently left the store with a full bag. Defendant was observed putting coats and sweatshirts into his bag and then attempting to leave the store. When defendant realized that he was being watched, he approached a cashier and requested to put the items on layaway. After being told that the store did not have a layaway plan but that he could open an instant charge with a driver's license and a credit card, defendant left the store, telling the clerk that he was going to retrieve his license. Defendant did not return to the store. Defendant and his accomplice were ultimately apprehended by the police. The vehicle in which defendant was riding contained garments from the Elder Beerman store and another store in the Midland Mall, the Finish Line store. Defendant subsequently told a police officer that he and his accomplice had gone to the Midland Mall to shoplift and that he had stolen the garments from the Finish Line store. Defendant also told the officer that the Elder Beerman garments found in the vehicle had been taken from the store that day. However, defendant was evasive with respect to who took the items from the Elder Beerman store.

On appeal, defendant first argues that the trial court erred when it denied his request to instruct the jury on the lesser included offense of attempted first-degree retail fraud. We disagree. Defendant incorrectly asserts that an attempt to commit a crime is a *necessarily* lesser included offense of the

charged crime. Rather, an attempt is only a cognate lesser included offense of the charged offense. *People v Adams*, 416 Mich 53, 56-57; 330 NW2d 634 (1982). Thus, the trial court was required to give an attempt instruction only if the evidence would have supported a conviction for attempt. *People v Hendricks*, 446 Mich 435, 444-446; 521 NW2d 546 (1994). Here, the prosecution's evidence established a completed crime, whereas defendant denied committing, or intending to commit, any crime whatsoever. Thus, we agree with the trial court that the evidence did not support an attempt instruction.

Next, defendant raises several issues with respect to the evidence that garments from the Elder Beerman store and the Finish Line store were recovered from the vehicle in which defendant was riding at the time he was apprehended. Specifically, defendant contends that this evidence was inadmissible under MRE 404(b). Defendant also contends that the prosecutor failed to provide the notice required by MRE 404(b)(2). However, with respect to the items from both stores, this evidence was properly admitted without regard to MRE 404(b) as part of the res gestae of the offense. *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996); *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995). Accordingly, there was no need to provide the notice required by MRE 404(b)(2). Alternatively, with respect to the items from the Elder Beerman store, the inference raised at trial was that defendant's accomplice took these items. Thus, MRE 404(b) is not implicated with respect to this evidence and there was no violation of MRE 404(b)(2). Even assuming, as found by the trial court, that MRE 404(b) was implicated with respect to the items taken from the Finish Line store, we conclude that this evidence was relevant to defendant's intent and that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.[1] MRE 401; MRE 403; MRE 404(b)(1). Defendant failed to preserve the notice issue by failing to object on this ground below. MRE 404(b)(2); *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). In summary, the trial court did not abuse its discretion in admitting the evidence that garments from the Elder Beerman store and the Finish Line store were recovered from the vehicle in which defendant was riding at the time he was apprehended. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). Although the trial court stated that it would give a cautionary instruction with respect to the garments taken from the Finish Line store, defendant indicated at that time that he wanted to research the matter further before making a decision whether to request such an instruction. The record does not reveal that defendant thereafter ever requested a cautionary instruction. Accordingly, we find no error.

Next, defendant complains that the prosecutor's cross-examination of him was improper. Because defendant did not object to the allegedly improper cross-examination, this Court will reverse only if a cautionary instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We agree that it was improper for the prosecutor to ask defendant to comment upon the veracity of the prosecution's witnesses. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, because there was no objection, and because we find that defendant was not prejudiced by the prosecutor's questions, reversal is not required. *Id*. at 17-18. We further find nothing improper with the prosecutor's questions regarding the police officer's version of defendant's statement to the police.

Finally, defendant was not deprived of a fair trial because of cumulative error. *People v Anderson*, 166 Mich App 455, 473; 421 NW2d 200 (1988).

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] We reach the same conclusion with respect to the evidence of the items taken from the Elder Beerman store.